85-2155 (1)

Docket No. 85-2695

Supreme Court, U.S.
FILED
MAR 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

March Term, 1986

OGDEN ANDERSON,)

Peitioner,)

VS.)

UNITED STATES
POSTAL SERVICE,)

Respondent.)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Ogden Anderson
Petitioner, Pro Se
1808 Franklin Road
Tuskegee Inst., AL 36088
205-727-3094

31pp

QUESTIONS PRESENTED

1. Does the accused government employee have the right to a hearing for which a full and verbatim transcript be kept? One of both, tape recorded or typewritten.

2. Does violation of this right also constitute a violation of due process, of law, and equal protection of the law as granted in Article 5 & 14 under the Bill of Rights of the Constitution of the United States?

The parties to the proceedings below are, Petitioner, OGDEN ANDERSON; Respondent, UNITED STATES POSTAL SERVICE.

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TABLE OF AUTHORITIES

DOCKET NO. 85-2695

IN THE SUPREME COURT

OF THE UNITED STATES

OGDEN ANDERSON,

PETITIONER,

VS.

UNITED STATES POSTAL SERVICE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

On February 14, 1985, the Merit Systems Protection Board entered a decision affirming the Petitioner's removal.

On June 12, 1985, a full review of the record was denied by the MSPB Board.

On December 6, 1985, The United States Court of Appeals for the Federal Circuit entered its decision affirming the Petitioner's removal.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, of the United States Code, Section 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "Nor shall any person be deprived of life, liberty, or property, without due process of law..."

United States Constitution, Amendment XIV:

> "No State shall deny to any person within its Jurisdiction the equal protection of the laws."

STATEMENT

Petitioner "express[es] a belief, based on reasoned and studied professional judgment, that this appeal

On June 12, 1965, a full review of the record was denied by the Writ Board.

On December 6, 1965, the United States Court of Appeals for the Federal Circuit ordered its decision affirming the Petitioner's removal.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, of the United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution.

Amendment V:

"Nor shall any person be deprived of life, liberty, or property, without due process of law..."

United States Constitution.
Amendment XIV:

"No State shall deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Petitioner "appealed a Decision, based on reasons and studied professional judgment, that this appeal

involves one or more professional judgment, that this appeal involves one or more precedent-setting questions of exceptional importance." (U.S. Court of Appeals for the Federal Circuit, Rule 19(b).

In addition, the purpose of this petition is to direct the Court's attention to some material matter of law which "... has so far departed from the accepted and usual court of judicial proceedings...as to call for an exercise of this Court's power of supervision" in deciding this case. (Supreme Court Rules), Rule, 17(a). Had these matters of law been given consideration, they probably would have brought about a different result in this case.

5 CFR ¶1201.54 the transcript of testimony etc. shall constitute the exclusive and official record.

5 CFR ¶1201.53(a), is very specific, wherein it states, in pertinent part that "A verbatim record

involves one or more procedural
judgment, that rule applies involves one
or more procedural-setting questions of
exceptional importance," (U.S. Court of
Appeals for the Federal Circuit, Rule
28(b).

In addition, the purpose of this
petition is to direct the Court's
attention to some material matter of law
which has so far departed from the
accepted and usual course of judicial
proceedings...as to call for an exercise
of this Court's power of supervision" in
deciding this case. (Supreme Court
Rules, Rule 17(a). And these matters
of law been given consideration, they
probably would have brought about a dif-
ferent result in this case.

5 USC §500(3)4 the testimony of
testimony etc. shall constitute the
exclusive and official record.

5 USC §706(2)(E), is very
specific, wherein it requires, in
pertinent part that "A reviewing court

made under the supervision of the presiding official shall be kept of every hearing..." Appendix A addition, (5 U.S.C) ¶7701(s)(1) states that, "[a] appellant shall have the right to a hearing for which a transcript will be kept..."

Appendix C transcript. That which has been transcribed. A copy of any kind, though commonly the term refers to a copy of the record of a trial, hearing or other proceeding. A writing made from or after an original. A copy of an original writing or deed and suggests the idea of an original writing. O'Quinn v. Tate, Tex. Civ. App., 187 S.W.2d 241, 243.

An official copy of the record of proceedings in a trial of hearing. Word-for-word typing of everything that was said "on the record" during the trial. The stenographer types this transcription which is paid for by the parties requesting it.

Transcript of Record. Refers to the printed record as made up in each case of the proceedings and pleadings necessary for the appellate court to review the history of the case.

On October 5, 1984, Petitioner was removed from his position as Postal Police Officer for alleged misconduct. The United States Postal Service (USPS) based its removal action on charges that the Petitioner allegedly withheld pertinent information from the Los Angeles Police Department (LAPD) and that he conspired with Kenneth Lottie (Mr. Lottie) to withhold evidence in a criminal investigation against Mr. Lottie from the LAPD.

Petitioner petitioned the United States Merit Systems Protection Board (the Board) and a hearing was held on January 30, 1985. On February 14, 1985, a judgment was entered by the Board, affirming Petitioner's removal.

Transcript of Record. Refers to the printed record as made up in each case of the proceedings and pleadings necessary for the appellate court to review the history of the case.

On October 3, 1984, Petitioner was removed from his position as Postal Police Officer for alleged misconduct. The United States Postal Service (USPS) based its removal action on charges that the Petitioner allegedly withheld pertinent information from the Los Angeles Police Department (LAPD) and that he conspired with Kenneth Lortie (Mr. Lortie) to withhold evidence in a criminal investigation against Mr. Lortie that the LAPD.

Petitioner petitioned the United States Merit Systems Protection Board (the Board) and a hearing was held on January 30, 1985. On February 14, 1985, a judgment was entered by the Board, affirming Petitioner's removal.

On or about April 1, 1985, Petitioner requested a full review of the record by the Board, and an order denying a full review was entered on June 12, 1985.

The record is clear that Mr. Lottie was the individual who initially accused the Petitioner of allegedly conspiring with him to withhold the evidence from the LAPD. The record is also clear that, based on Mr. Lottie's charge, which was corroborated by Mr. Lottie's mother, Mrs. Arlene LeBlanc (Mrs. LeBlanc), the USPS initiated an investigation which subsequently led to the Petitioner's removal.

On May 1, 1985, Petitioner's representative, Mr. Ronald Calvin (Mr. Calvin) ordered a copy of the transcripts from the initial Board hearing. Upon receipt of the transcripts, Mr. Calvin noted that the transcripts were incomplete and that they did not contain the testimonies of

either Mr. Lottie or Mr. Lottie's mother, Mrs. LeBlanc.

Mr. Calvin notified the Board of the discrepancy in a letter dated June 12, 1985, wherein he stated that, "without such transcripts of these two testimonies, it [was] virtually impossible for the [petitioner] to continue his appeal process." (A copy of Mr. Calvin's letter is attached hereto and incorporated herein by reference as Appendix D). Mr. Calvin also notified the ACME REPORTING COMPANY, INC. (ACME), the agency responsible for tape recording the proceedings at the initial Board hearing. ACME subsequently notified the Board of the possible discrepancy and requested that the Board's copies of the recorded tapes be sent to ACME for comparison. (A copy of the letter requesting the Board's tapes is attached hereto and incorporated herein by reference as Appendix E). On July 8,

either Mr. Lottie or Mr. Lottie's mother, Mrs. Lebianc.

Mr. Calvin notified the Board of the discrepancy in a letter dated June 12, 1985, wherein he stated that "without such transcripts of these two depositions, it [was] virtually impossible for the [petitioner] to continue his appeal process." (A copy of Mr. Calvin's letter is attached hereto and incorporated herein by reference as Appendix D). Mr. Calvin also notified the JACK BROCKING COMPANY, INC. (JACKO), the agency responsible for tape recording the proceedings at the initial meeting. JACKO subsequently notified the Board of the possible discrepancy and requested that the Board's copies of the recorded tapes be sent to JACKO for comparison. (A copy of the letter requesting the Board's tapes is attached hereto and incorporated herein by reference as Appendix E). On July 8,

1985, ACME notified the Petitioner and interested parties of the possible discrepancy that the Board's copies of the tapes were presently being sent to ACME for comparison. (A copy of ACME's letter of notification is attached hereto and incorporated hereby by reference as Appendix F).

On August 1, 1985, ACME notified the Petitioner and the Board that "A" comparison of the tapes... reveals that the Board's copy of the tapes have only the beginning testimony of Kenneth Lottie, and none of Arlene LeBlanc." (A copy of the letter is attached hereto and incorporated herein by reference as Appendix G).

The Petitioner asserts that Mr. Lottie and Mrs. LeBlanc made numerous statement, under oath, that severely damaged the credibility of the charge of conspiracy against the Petitioner. Additionally, Petitioner asserts that Mr. Lottie testified that he went to get

a light for his cigarette on two separate occasions from fellow employees through an open window in the hallway adjacent to the detention room where he was being held by Petitioner. Petitioner also asserts that Mr. Lottie testified that he could not have made a deal for the sale of a motorcycle from the Petitioner, because he was deathly afraid of motorcycles. The record is clear that on the day that Mr. Lottie was apprehended by Petitioner, he was attempting to leave postal property on a Mo-Ped Motorcycle.

Without Mr. Lottie's testimony, it is impossible for the Petitioner to substantiate his claims, and likewise mount an adequate defense.

The Board must be held responsible for the actions or inactions of the agency it designated to record the testimony at the hearing.

Based on the foregoing, it is apparent that the presiding official did

a light for his cigarette or two
separate occasions from fellow employees
through an open window in the hallway
adjacent to the detention room where he
was being held by Petitioner.

Petitioner also alerts that Mr. Botts
testified that he could not have made a
deal for the sale of a motorcycle from
the Petitioner, because he was deathly
afraid of motorcycles. The record is
clear that on the day that Mr. Botts
was approached by Petitioner, he was
attempting to leave postal property on a
No-Fed Motorcycle.

Without Mr. Botts's testimony, it
is impossible for the Petitioner to
substantiate his claims, and likewise
refute an adequate defense.

The Board must be held responsible
for the actions or inactions of the
agency it designated to record the
testimony at the hearing.

Based on the foregoing, it is
apparent that the presiding official did

not have access to a complete record of the hearing from which to derive an accurate assessment of the case. Additionally,

Although the presiding official is allowed "great deference" in deciding a case before the Board, the Petitioner knows that the omission of the testimony of the two key witnesses against him, has caused substantial harm and has prejudiced his right to proceed in his defense.

Harmful error is defined as "error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached." 5 CFR ¶1201.57(c)(1)

"In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or

conclusions found to be ...obtained without procedures required by law, rule or regulation having been followed..." 9 U.S.C §7703(c). In this unique case, it is apparent that the MSPS full board, nor the U. S. Court of Appeals bothered to review the record, because had they done so, they would have discovered, as the Petitioner had pointed out, that two (2) of the postal service witnesses testimonies were completely missing from the recorded transcript of the hearing.

There is no case law wherein a provision is made for the omission of testimony from recorded tapes of a hearing, thusly Petitioner respectfully requests that this memorandum be fully considered.

Date: March 27, 1986

Respectfully submitted,

Odden Anderson

Odden Anderson
Petitioner In Pro Se

APPENDIX A

5 CFR 1201.54 Official Record

The transcript of testimony and exhibits, together with all papers and motions filed in the proceedings, shall constitute the exclusive and official record

APPENDIX B

5 USC 7701(a)

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board

APPENDIX C

Blacks Law Dictionary

Transcript. That which has been transcribed. A copy of any kind, though commonly the term refers to a copy of the record of a trial, hearing or other proceeding. A writing made from or after an original. A copy of an original wriring. O'Quinn v. Tate, Tex. Civ. App., 187 S.W.2d 241,243.

An official copy of the record of proceedings in a trial or hearing. Word-for-word typing of everything that was said "on the record" during the trial. The stenographer types this transcription which is paid for by the parties requesting it. Transcript of record. Refers to the printed record as made up in each case of the proceedings and pleadings necessary for the appellate court to review the history of the case.

APPENDIX D

FEDERATION OF POSTAL OFFICES

Local #22

1042 E. Turmont St.

Carson, CA 90746

May 12, 1985

Appeals Review Board

Merit Systems Protection Board

1120 Vermont NW

Washington, DC 20419

Case #7528510089

Appellant: Ogden Anderson

Respondent: U. S. Postal Service

Dear Sirs:

After reviewing a copy of the transcript (case #7528510089) supplied to my by the Acme Reporting Company, I have found that the transcript is incomplete. Both testimonies of witnesses Kenneth Lottie and his mother, Arlene La Blanc, are missing. These testimonies are highly relevant to this case. Without such transcripts of these two testimonies, it

is vertually impossible for the appellant to continue his appeal process.

I immediately contacted Jim Oswell of the Acme Reporting Company and informed him of the missing testimonies. Mr. Oswell assure us he would contact the Board and inform them of this discrepancy. On May 8, 1985 Mr. Oswell was contacted again, at which time heindicated that he had never received any response from the Board in reference to this matter.

We respectfully request that the Board consider granting the appellant a new Hearing based on the above mentioned discrepancies in the transcript. Naturally, a new Hearing would not be necessary if the Board can render a

favorable decision based on the information previously presented on the appellant's behalf.

Respectfully submitted,

/s/ Ronald Calvin

Ronald Calvin
Representative for Appellant

cc: Inspector Fallis
Representative for Postal

APPENDIX E

ACME REPORTING COMPANY, INC.

14024 A Marquesas Way

Marina del Rey, California 90292

(213)821-4195

June 26, 1985

Mr. Michael Hoxie

Merit Systems Protection Board

Office of Clerk of the Board

1120 Vermont Ave., N.W.

Washington, D.C. 20419

Dear Mr. Hoxie:

Per our telephone conversation on June 26, 1985, I would like to request the Board's copies of the recorded tapes of the testimony taken in the matter of: OGDEN ANDERSON v. U. S. POSTAL SERVICE, SFO 7528510089 on January 30, 1985, Fenton Hughes, presiding.

These tapes will be returned to you upon comparison with the tapes that I have at this office.

Thank you for your assistance.

Sincerely,

/s/ James H. Oswald

James H. Oswald,
Branch Manager

cc: Ogden Anderson

JHO/mk

APPENDIX F

ACME REPORTING COMPANY, INC.
14024 A Marquesas Way
Marina del Rey, California 90292
(213)821-4195

July 8, 1985

TO: Mr. Ogden Anderson and Interested Parties

FROM Acme Reporting Co., Inc.

RE: MSPB Hearing

The purpose of this letter is to inform those interested parties of the possibility of a discrepancy between the transcript of an MSPB hearing held of January 30, 1985, OGDEN ANDERSON V. USPS and the cassette tapes in the possession of the Board.

The discrepancy involves the testimony of two witnesses which may or may not be recorded on the Board's tapes.

The Clerk of the Board, Mr. Michael Hoxie is presently sending the Board's cassette tape copies to Acme Reporting in Los Angeles for comparison.

Sincerely,

/s/ James H. Oswald

James H. Oswald,

Branch Manager

JHO/mk

APPENDIX G

ACME REPORTING COMPANY, INC.

14024 A Marquesas Way

Marina del Rey, California 90292

(213)821-4195

August 1, 1985

TO: Mr. Ogden Anderson and Interested Parties

RE: MSPB Hearing

A comparison of tapes in the matter of Ogden Anderson v. U.S.P.S., SFO 7528510089 reveals that the Board's copy of the tapes have only the beginning testimony of Kenneth Lottie, and non of Arlene LaBlanc. The testimony transcribed in the transcript furnished to Mr. Anderson does not have the testimony of these witnesses either.

Mr. Anderson represente that these two witnesses testified following Susie Moore, and prioer to William Carle. The reporter's notes also reflect this.

Although the testimony of John Gerber is present in Mr. Anderson's transcript, it does not appear to be on the tapes furnished to the Board.

Sincerely,

/s/ James H. Oswald

James H. Oswald,

Branch Manager

JHO/mk

cc: Michael Hoxie

APPENDIX H

See Kerr v. National Endowment for the Arts, 13 MSPB 39, 40 (1983), aff'd, Transportation, 3 MSPB 261 (1980). In any event, the testimony of the two witnesses can be heard on the tape cassettes which constitute the verbatim record of the proceeding and, thus, even if the copy of the transcript secured by the appellant inadvertently omitted a portion of the evidence, that evidence is part of the verbatim record and was properly considered by the presiding official. See Tracy v. Department of the Army, 23 M.S.P.R. 115, 117 (1984).

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 85-2695
MSPB NO.
SFO 7528510089

OGDEN ANDERSON,

Petitioner

vs.

U. S. POSTAL SERVICE,

REspondent

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD THIS CAUSE having been heard and considered, it is ORDERED and ADJUDGED: Affirmed.

DATED December 6, 1985

ENTERED BY ORDER OF THE COURT

Francis X. Gindhart, Clerk

/s/ Francis X. Gindhart

ISSUED AS A MANDATE: January 24, 1986

CERTIFICATE OF SERVICE

I, Ogden Anderson of Tuskegee, Alabama - Macon County certify: that I am, and at all times hereinafter mentioned was, more than 18 years of age; that on March 27, 1986, I served an original and a true copy of the within Petition For Writ of Certiorari to the United States Supreme Court by placing a true and correct copy thereof with postage thereon, fully prepaid in the United States mail, addressed as follows:

Express Mail, Next Day Service: 40 copies

UNITED STATES SUPREME COURT
For the FEDERAL CIRCUIT
717 Madison Place, N.W.
Washington, D.C. 20439

Certified Mail: 3 copies

MS. JANE W. VANNEMAN
Commercial Litigation Branch
Civil Division
U. S. Department of Justice
Washington, D.C. 20530

CERTIFICATE OF SERVICE

I, Ogden Rowland of Tuskegee, Alabama - Macon County Precinct, that am, and at all times hereinafter mentioned was, more than 18 years of age; that on March 27, 1965, I served an original and a true copy of the within Petition for Writ of Certiorari to the United States Supreme Court by placing a true and correct copy thereof with postage thereon, fully prepaid in the United States mail, addressed as follows:

Express Mail, Next Day Service - 10 copies

UNITED STATES SUPREME COURT
One Hundred Eighty Eighty
717 Madison Place, N.W.
Washington, D.C. 20439

Certified Mail: 3 copies

Mr. Jack W. Hawkins
Commercial Litigation Branch
Civil Division
U. S. Department of Justice
Washington, D.C. 20530

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 26, 1986

Ogden Anderson

Supreme Court, U.S.
FILED
NOV 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2155

In the Supreme Court of the United States

OCTOBER TERM, 1986

OGDEN ANDERSON, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2155

OGDEN ANDERSON, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The judgment of the court of appeals (Pet. App. 25) in this civil action was entered on December 6, 1985. Petitioner did not seek rehearing and did not obtain an extension of time within which to file a petition for a writ of certiorari. The time for filing a petition accordingly expired on March 6, 1986. 28 U.S.C. 2101(c). The petition was not filed until March 7, 1986. The petition, which was filed pro se, was not accompanied by a notarized statement by a member of the Bar of this Court stating that the mailing took place on a particular date within the permitted time. See Rule 28.2 of the Rules of this Court. The petition was therefore out of time. The time limit provided by 28 U.S.C. 2101(c) is jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1986